No. 74-753

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 499 F. 2d 690.

JURISDICTION

The judgment of the Court of Claims (Pet. App. A, p. 3a) was entered on July 19, 1974. Respondents' motion to amend the judgment was granted on

November 1, 1974 (Pet. App. B).[1] On October 17, 1974, and November 19, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari respectively to November 16, 1974, and December 16, 1974 (App. 118, 119). The petition was filed on December 16, 1974, and was granted on February 18, 1975 (*id.* at 120).

The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims should have dismissed this suit for reclassification of federal civil service positions and back pay for lack of jurisdiction under the Tucker Act.

2. Whether, in determining the correctness of respondents' classifications, the Classification Act requires that the positions held by respondents be compared with those of employees in another agency.

STATUTES INVOLVED

The Tucker Act, as amended, 28 U.S.C. 1491, provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation

[1] The order entered by the Court of Claims on November 1, 1974, required the Civil Service Commission to comply with the court's directions within 6 months of its judgment, as amended (Pet. App. B).

> of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Classification Act, as amended, 5 U.S.C. 5101, *et seq.*, provides in relevant part:

> § 5101. *Purpose.*
>
> It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work will be followed;
>
> * * * * *
>
> § 5107. *Classification of positions.*
>
> Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Civil Service Commission or, if no published standards apply directly, consistently with published standards. When facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. * * * [T]hese actions of an agency are the basis for pay and personnel transactions until changed by certificate of the Commission.
>
> § 5110. *Review of classification of positions.*
>
> (a) The Civil Service Commission, from time to time, shall review such number of positions in each agency as will enable the Commission to de-

termine whether the agency is placing positions in classes and grades in conformance with or consistently with published standards.

(b) When the Commission finds under subsection (a) of this section that a position is not placed in its proper class and grade in conformance with the published standards * * *, it shall, after consultation with appropriate officials of the agency concerned, place the position in its appropriate class and grade and shall certify this action to the agency. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officials.

§ 5112. *General authority of the Civil Service Commission.*

(a) Notwithstanding section 5107 of this title, the Civil Service Commission may—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position;

(2) place in an appropriate class and grade a newly created position or a position coming initially under this chapter;

(3) decide whether a position is in its appropriate class and grade; and

(4) change a position from one class or grade to another class or grade when the facts warrant.

The Commission shall certify to the agency concerned its action under paragraph (2) or (4) of this subsection. The agency shall act in accordance with the certificate, and the certificate is

binding on all administrative, certifying, payroll, disbursing, and accounting officials.

(b) An employee affected or any agency may request at any time that the Commission exercise the authority granted to it by subsection (a) of this section and the Commission shall act on the request.

The Back Pay Act of 1966, as amended, 5 U.S.C. 5596, provides in relevant part:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; * * *.

STATEMENT

This is a suit by two federal civil service employees, purportedly under the Tucker Act, 28 U.S.C. 1491, seeking the reclassification of their positions to a higher grade and back pay. Respondents are em-

ployed by the Defense Personnel Support Center of the Defense Supply Agency as trial attorneys with the civil service grade of GS-13 (App. 43). On December 9, 1969, they requested their employing agency to reclassify their positions to grade GS-14 on the ground that according to standards promulgated by the Civil Service Commission their positions should be classified at that level (App. 44). In addition, respondents contended that their duties were identical to those of attorneys in positions classified as GS-14 in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command ("A.F.L.C.") in Dayton, Ohio, and that under the "equal pay for substantially equal work" provision of the Classification Act, 5 U.S.C. 5101(1)(A), they were entitled to the higher classification (*ibid.*).

The Defense Supply Agency, after an audit by a position classification specialist, concluded that respondents' positions were correctly classified at GS-13 under the Civil Service Commission's classification standards (*id.* at 45, 91-92). On respondent's appeal, the Civil Service Commission reached the same conclusion and denied reclassification (*id.* at 44-45, 101-102). The Commission also ruled that a comparison of the positions held by respondents with those of attorneys employed by the A.F.L.C. was not a proper method of classification (*id.* at 45, 101).[2]

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[2] The Regional Director, United States Civil Service Commission, Philadelphia Region, stated in denying respondents' appeals that (App. 94):

> [a]ll positions subject to the Classification law contained in Title 5, U.S. Code, must be classified in conformance with published position classification standards of the Civil Service Commission, where these exist. For this reason your position may not be classified on the basis of comparison with the particular Attorney positions in other Government installations, which were cited in your appeal.

This ruling was confirmed in the order of the Commissioners of the Civil Service Commission denying respondents' request to reopen their case (App. 101):

> In any event, the Commission does not classify a position by comparison of the duties of the position with the duties of positions in other agencies, but determines the proper classification of a position by comparison of the duties with the applicable classification standards.

Respondents then instituted this suit in the Court of Claims, seeking (1) an order directing reclassification of their positions as of the date of the first administrative denial of their request and (2) back pay accrued from that date (App. 10-11). The Court of Claims, in a 4-3 decision, held that the Tucker Act empowered it to adjudicate claims founded upon the Classification Act (Pet. App. A). On the merits, the court concluded that the Civil Service Commission's failure to compare respondents' positions with those of the A.F.L.C. attorneys was arbitrary and capricious (*id.* at 2a). Although the court stated that it is "[o]rdinarily" not arbitrary and capricious for the Commission to refuse to make specific position-to-position comparisons, it held that such comparisons were required in this case since the "employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees [were]

specifically pointed out by the complaining employees" (*ibid.*). The court therefore remanded the case to the Commission pursuant to the Remand Statute, Pub. L. 92-415, 86 Stat. 652, to make the comparison and to report the results to the court (*id.* at 3a).[3]

SUMMARY OF ARGUMENT

I. The threshold question presented by this case is whether the Classification Act or the Back Pay Act provides a monetary remedy for the period of a wrongful civil service classification. If either act provides for such a remedy, the Court of Claims' jurisdiction to entertain the present suit under the Tucker Act would be undoubted. If, on the other hand, neither act creates a substantive right to recover back pay for the period of a wrongful classification, the Court of Claims erred in not dismissing the suit for lack of jurisdiction. These results simply reflect the settled principle that the Court of Claims' jurisdiction under the Tucker Act extends only to con-

[3] The trial judge assigned to try the case by the Court of Claims had concluded that respondents were not entitled to the receipt of back pay because of their allegedly wrongful classifications (App. 57). He nevertheless recommended, however, that the case be remanded to the Civil Service Commission with directions to reclassify respondents as GS-14s (*id.* at 117). The majority of the Court of Claims rejected these recommendations, noting that "we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the [respondents] to Grade GS-14" (Pet. App. A, p. 3a).

troversies in which the claimant asserts a present right to a money judgment against the United States.

The Court of Claims' ruling sustaining its jurisdiction disclaimed reliance upon the Back Pay Act, and held by implication that the Classification Act creates a substantive right to back pay for wrongful classifications. We submit that that holding was in error. There is no provision in the Classification Act expressly waiving the sovereign immunity of the United States to suits seeking back pay for the period of a wrongful civil service classification and, under prevailing law, it is clear that such a waiver may not be found by implication. The history of the relationship between the federal government and its employees shows conclusively, moreover, that Congress did not intend to permit the award of back pay in such circumstances. Finally, although the Court of Claims did not rest its decision in this case on the Back Pay Act, it should be noted that that Act does not apply to wrongful classification claims.

II. The Court of Claims also misconstrued the substantive provisions of the Classification Act in a manner that will seriously impair the Act's effective administration. The *ad hoc* comparison required by the court between the positions held by respondents and positions in another federal agency has no warrant in the language or the legislative history of the Classification Act. Indeed, in enacting the Classification Act Congress specifically rejected *ad hoc* position-to-position comparison as a method of classification and required instead that civil service posi-

tions be classified by reference to a set of general classification standards promulgated by the Commission. Although the Court of Claims purported to limit its holding to the "peculiar" facts of the present case, we submit that the holding is not as susceptible to principled limitation as the court appeared to imply and that it will have the effect of distorting the classification system provided for by Congress in a substantial number of cases.

Congress' decision not to require employing agencies and the Civil Service Commission directly to compare the functions performed by particular employees with those performed elsewhere in the federal bureaucracy was largely dictated by practical considerations. Approximately 1.3 million persons are presently included in the federal civil service program, and the task of properly classifying the positions held by those persons is exceedingly complex. As a practical matter, the classification decisions reached by a person's employing agency will normally represent final rulings. In making those decisions, employing agencies generally do not have access to the kind of detailed information needed to make inter-agency comparisons of particular positions. While the Commission can obtain such information, Congress recognized in the Classification Act that the Commission could not involve itself in every classification case.

Even if Congress had intended Commission review of every classification decision reached by an employing agency, it would impose an unwarranted burden on the Commission to require *ad hoc* inter-agency comparisons—whether at the behest of particular em-

ployees or as a matter of general reviewing policy. Since the position or positions that are asserted to provide a standard for comparison in any given case may themselves be incorrectly classified under the Commission's general standards, the Commission would have to undertake a detailed investigation of those positions in order to provide itself with reliable data for reviewing the classification being appealed. There is no indication that Congress intended the Commission to shoulder the enormous administrative burdens of such investigations. This conclusion is confirmed by the Commission's long-standing administrative interpretation of its responsibilities under the Classification Act.

ARGUMENT

I. The Court Of Claims Lacked Jurisdiction To Entertain This Suit Since Neither The Classification Act Nor The Back Pay Act Provides A Monetary Remedy For The Period Of A Wrongful Classification

The central provision establishing the jurisdiction of the Court of Claims is that part of the Tucker Act codified in 28 U.S.C. 1491. That section provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or

> for liquidated or unliquidated damages in cases not sounding in tort.[4]

This Court has repeatedly held that this statutory formulation limits the jurisdiction of the Court of Claims to cases involving claims for "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3; accord, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *Jones*, 131 U.S. 1, 18. It has long been established as well that, in view of the historical functions of and limitations upon the jurisdiction of the Court of Claims, that court lacks jurisdiction to issue declaratory judgments or to pass upon purely equitable matters. *E.g.*, *United States* v. *King*, *supra*, 395 U.S. at 3-5.[5]

It is of course similarly settled that the Tucker Act does not itself create any substantive right, enforceable against the United States, for "actual, presently due money damages." The Tucker Act merely confers jurisdiction in the Court of Claims whenever such a substantive right exists. See *Eastport*

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[4] The Judicial Code also gives the Court of Claims jurisdiction over matters arising from "any unsettled account" of federal officers or contractors, 28 U.S.C. 1494, and in a variety of other special situations not present here, 28 U.S.C. 1495-1499, 1504, 1505.

[5] See also *Lee* v. *Thornton*, No. 73-7006, decided February 18, 1975 (the Tucker Act provisions codified in 28 U.S.C. 1346(a), establishing limited federal district court jurisdiction "concurrent with the Court of Claims", authorize damage awards but not injunctive or declaratory relief); accord, *Richardson* v. *Morris*, 409 U.S. 464, 465-466.

S.S. Corp. v. *United States*, 372 F. 2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607.[6] Thus, the pivotal issue in the present case, so far as the Court of Claims' jurisdiction is concerned, is whether any federal statute confers upon respondents a substantive right to recover money damages from the United States for the period of their alleged wrongful civil service classifications.

The only possible sources of such a substantive right are the Classification Act and the Back Pay Act of 1966. The trial judge found in the present case that respondents were not entitled to back pay for the period of their alleged wrongful classifications under the Back Pay Act, 5 U.S.C. 5596;[7] and, as noted above, the Court of Claims held that there was no need for it to consider in the present case whether that Act created a claim for monetary relief in wrongful classification cases (Pet. App. A, p. 3a). Implicit in the Court of Claims' decision in this case, therefore, is the theory that a violation of the Classification Act

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[6] The Court of Claims noted in *Eastport S.S. Corp.* that in order to determine the limits of its jurisdiction under the Tucker Act "what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [that part of the Tucker Act codified in 28 U.S.C. 1491], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision" (372 F. 2d at 1009, 178 Ct. Cl. at 607).

[7] App. 57.

gives rise to a claim for money damages against the United States in the amount of the back pay lost by respondents by virtue of their purported wrongful classifications.

In assessing the validity of this theory, it is well to begin by recognizing that established concepts of sovereign immunity make it clear that the United States may not be sued "save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. As this Court stated in *United States* v. *King*, *supra*, 395 U.S. at 4, a waiver of sovereign immunity cannot be implied but must be directly and unequivocally expressed. Accord, *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Shaw*, 309 U.S. 495, 500; *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 536. Thus, apart from the authority expressly conferred by statute, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood*, *supra*, 312 U.S. at 587-588.

The Classification Act does not contain any provision or provisions expressly waiving the sovereign immunity of the United States to suits seeking back pay for the allegedly improper classification of federal civil service positions. In the "purpose" section of the Classification Act, 5 U.S.C. 5101, Congress provided that one of the principles guiding the classification of federal employees should be "equal pay

for substantially equal work." In subsequent sections of the Act, Congress both set out generally-applicable substantive standards to be observed in grading particular positions and provided for procedures ensuring that such standards would be effectively and equitably administered—in accordance with the congressional purposes expressed in Section 5101. We shall discuss the essentials of the classification scheme provided for by Congress in the Classification Act in a later section of this brief (see discussion, *infra*, at pp. 22-23). But no amount of analysis of that scheme, viewed as a whole or section-by-section, can avoid the conclusion that Congress made no provision in the Classification Act for the award of back pay to persons found, whether administratively or by judicial decision, to have been erroneously classified.

Although the Court of Claims did not address the issue, it should also be noted that the Back Pay Act of 1966 does not apply to wrongful classification claims.[8] The Back Pay Act authorizes the retroactive recovery of wages whenever a federal employee has been subjected to "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part" of the compensation to

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[8] The 1967 legislation codifying the Back Pay Act in 5 U.S.C. 5596, Pub. L. 90-83, 81 Stat. 203-204, made no substantive changes in the Act. See H.R. Rep. No. 124, 90th Cong., 1st Sess., pp. 2, 10-11 (1967); S. Rep. No. 482, 90th Cong., 1st Sess., pp. 6, 14-15 (1967); 113 Cong. Rec. 8109 (1967) (colloquy between Congressman Gross and Congressman Kastenmeier); 113 Cong. Rec. 23905 (1967) (colloquy between Congressman Ford and Congressman Celler).

which he was otherwise entitled. 5 U.S.C. 5596. This language was not intended to cover wrongful classifications, however, but was aimed at providing a monetary remedy for wrongful reductions in grade, removals and suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [which] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess. p. 3 (1966). The Civil Service Commission has consistently so construed the Back Pay Act (see 5 C.F.R. 550.803), as, indeed, has the Court of Claims (see, *e.g.*, *Desmond* v. *United States*, 201 Ct. Cl. 507, 526; *Ainsworth* v. *United States*, 399 F. 2d 176, 182-183, 185 Ct. Cl. 110, 120-121; *Dianish* v. *United States*, 183 Ct. Cl. 702, 707-709).

In reaching the merits of respondents' contentions, the Court of Claims did not in this case directly confront any of these impediments to its jurisdiction. The court did not, for example, point to any provision in the Classification Act authorizing the award of back pay in the event of a wrongful civil service classification and, as noted, it expressly disclaimed reliance upon the Back Pay Act as a predicate to its assumption of jurisdiction. Neither did the Court of Claims mention the doctrine of sovereign immunity or, more specifically, that consent to suit by the United States must be express and unequivocal and may not be found by implication.

In the latter connection, it should be noted that even if the doctrine of sovereign immunity did permit a consent to suit by the United States to be found by implication, the Court of Claims nevertheless would have been without jurisdiction in the present case. This conclusion follows from the history of the legal relationship between the federal government and its employees—a history which provides conclusive evidence of Congress' intention not to permit the recovery of back pay for the period of a wrongful civil service classification.

The prevailing rule for many years was that individual federal personnel actions were not subject to any judicial review. Thus, courts repeatedly refused to intervene where an employee claimed that he had been wrongfully discharged. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 69-70; *Keim* v. *United States*, 177 U.S. 290, 293-296. The courts similarly refused to grant any relief to employees who claimed that they had been denied promotions on improper grounds. See, *e.g.*, *Keim* v. *United States*, *supra*, 177 U.S. at 296; *United States* v. *McLean*, 95 U.S. 750, 753; *Tierney* v. *United States*, 168 Ct. Cl. 77, 80-81.

While Congress has now specifically provided in the Lloyd-LaFollette Act, 5 U.S.C. 7501, for administrative review of wrongful discharge claims, and in the Back Pay Act for the award of money damages for wrongful discharge, federal employing agencies continue to have broad discretion in determining most matters relating to the terms and conditions of federal employement.[9] One aspect of

[9] Indeed, wrongful discharge claims continue to be subject only to limited judicial review. See *Sampson* v. *Murray*, *supra*,

this broad discretion is the long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade. See, *e.g.*, *United States* v. *McLean*, *supra*, 95 U.S. at 753; *Ganse* v. *United States*, 376 F. 2d 900, 902, 180 Ct. Cl. 183, 186; *Tierney* v. *United States*, *supra*, 168 Ct. Cl. at 80-81; *Amundson* v. *United States*, 120 F. Supp. 201, 202, 128 Ct. Cl. 80, 82; *Price* v. *United States*, 80 F. Supp. 542, 543, 112 Ct. Cl. 198, 200; *Dvorkin* v. *United States*, 101 Ct. Cl. 296, 297, certiorari denied, 323 U.S. 730; *Coleman* v. *United States*, 100 Ct. Cl. 41, 43; *Brech* v. *United States Immigration & Nat. Service*, 362 F. Supp. 914, 917 (S.D. N.Y.).[10]

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415 U.S. at 74; *Grover* v. *United States*, 200 Ct. Cl. 337, 343; *Morelli* v. *United States*, 177 Ct. Cl. 848, 858; *Dargo* v. *United States*, 176 Ct. Cl. 1193, 1198-1199; *Hopper* v. *United States*, 176 Ct. Cl. 172, 176; *Gibson* v. *United States*, 176 Ct. Cl. 102, 108-110.

[10] The fact that respondents do not have any substantive right to recover money damages from the United States for the period of their allegedly wrongful classifications, while negating jurisdiction in the Court of Claims under the Tucker Act, does not necessarily mean of course that no court has jurisdiction over respondents' claims for equitable relief. In that connection, it should be noted that on September 16, 1971, respondents filed an action for mandamus in the United States District Court for the Eastern District of Pennsylvania, seeking an order directing the Civil Service Commission to reclassify their positions to grade GS-14. *Testan and Zarrilli* v. *Hampton, et al.* (Civil Action No. 71-2250). This suit was discontinued by respondents, without prejudice, on March 22, 1972. The district court's jurisdiction to grant the equitable relief sought by respondents would presumably be dealt with should the suit in the Eastern District be reactivated.

Had Congress intended to depart from this long-standing rule, it could have done so in either the Classification Act or the Back Pay Act. The absence of any provision in either Act specifically doing so can only be interpreted as evidence of Congress' intention not to permit suits for back pay in the present circumstances. This conclusion is fortified by the fact that in the Back Pay Act Congress did provide for money damages for improper discharges of federal employees but not for improper classifications. Consequently, even if it were appropriate to ignore the doctrine of sovereign immunity here, the Court of Claims would still have been without jurisdiction since the available evidence indicates that Congress did not intend to create a substantive right to back pay for the period of a wrongful civil service classification.

In reaching a contrary conclusion, the majority of the Court of Claims held that the pivotal jurisdictional issue was whether respondents were legally entitled to a higher position (Pet. App. A, p. 2a). The court did not then hold that respondents are entitled to the promotion they are seeking, but simply remanded the matter to the Civil Service Commission for further proceedings. If the Civil Service Commission were to find upon remand that respondents are entitled to promotion, the Court of Claims would presumably be prepared on appropriate motion to

enter an award of money damages in respondents' favor for the amount of whatever back pay they lost during the period of their wrongful classifications.

If there were any statutory authority for the award of back pay in the circumstances presented by this case, we would have no quarrel with the procedural means chosen by the court to determine the issue of respondents' legal entitlement to higher positions than those to which they were appointed. The Remand Statute, Pub. L. 92-415, 86 Stat. 652,[11] authorizes the Court of Claims (1) to issue "orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" to complement the relief afforded by a money judgment; and (2) "to remand appropriate matters" to administrative or executive bodies or officials "with such direction as [the court] * * * may deem proper and just" in cases already "within its jurisdiction." The Remand Statute does not empower the court to remand a case for further administrative proceedings, however, where—as here—the claimants have no hope of ever establishing any substantive right against the United States for "actual, presently due money damages." More simply stated, the Remand Statute applies only to cases already "within [the court's] * * * jurisdiction", and this is not such a case.[12]

[11] The Remand Statute is codified as part of 28 U.S.C. (Supp. III) 1491.

[12] When the Remand Statute was being considered by the Ninety-Second Congress, the language of the proposed legislation was narrowed in order to meet the Department of Justice's objection that the bill should make clear that Congress was not broadening the jurisdiction of the Court of Claims or conferring general authority on that court to issue the full panoply of remedies available to the federal district courts. See S. Rep. No. 92-1066, 92d Cong., 2d Sess., pp. 2, 4, 5 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess., pp. 5, 6 (1972); Hearings on H.R. 12979 and H.R. 12392 before a Subcommittee of the House Committee on the Judiciary, 92d Cong., 2d Sess., pp. 114, 116, 119-128 (1972). The language of the Remand Statute, as ultimately enacted, closely tracks that of the amended bill suggested by the Department of Justice. See Hearings on H.R. 12979 and H.R. 12392, *supra*, at 124. The Senate and House Reports on Pub. L. 92-415 expressly confirm the understanding of Congress that the Remand Statute "does not extend the class of cases over which the Court of Claims has jurisdiction" (S. Rep. No. 92-1066, *supra*, at 1; H.R. Rep. No. 92-1023, *supra*, at 3).

The only authority cited by the majority of the Court of Claims in support of its assumption of jurisdiction over respondents' claims are several recent Court of Claims decisions, dealing for the most part with claims of racial discrimination in federal employment or promotions (see Pet. App. A, p. 2a).[13]

[13] *Selman* v. *United States*, 498 F. 2d 1354, 204 Ct. Cl. 675, did not involve a claim of racial discrimination in federal employment but a claim that the Navy, for reasons without a statutory predicate, had not paid several Assistant Judge Advocates General at their respective levels of entitlement. In holding in favor of the plaintiffs, the Court of Claims relied upon the following statutory provision (37 U.S.C. 202(*l*):

> Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

There is no such mandatory provision in either the Classification Act or the Back Pay Act.

Only one of those cases (*Bookman* v. *United States*, 453 F. 2d 1263, 197 Ct. Cl. 108) involved a claim that a wrongfully classified federal employee was entitled to back pay under the Classification Act, however, and the Court of Claims did not there discuss the issue of its jurisdiction. In none of the cases cited by the court, moreover, did the court discuss the jurisdictional significance of the Back Pay Act. As a consequence, even if those cases were properly decided [14] they are readily distinguished from and do not control the present case.

In summary, the Court of Claims erred in assuming jurisdiction over the respondents' contentions since neither the Classification Act nor the Back Pay Act creates a substantive right to back pay for the period of their allegedly wrongful classifications. Since respondents do not now, nor will they at any time in the future, have any chance of establishing a right to "actual, presently due money damages," the Court of Claims should have dismissed their petition rather than remanding the case to the Civil Service Commission.

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[14] But see *Ogletree* v. *McNamara*, 449 F.2d 93 (C.A. 6); *Gnotta* v. *United States*, 415 F. 2d 1271 (C.A. 8), certiorari denied, 397 U.S. 934; *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451 (C.A.D.C.), certiorari denied, 382 U.S. 978; *Congress of Racial Equality* v. *Commissioner*, 270 F. Supp. 537 (D. Md.).

II. The Classification Act Does Not Require That The Positions Held By Respondents Be Compared With Those Of Employees In Another Agency

The Court of Claims also misinterpreted the substantive provisions of the Classification Act in remanding this case to the Civil Service Commission, for the latter to compare the positions held by respondents with those of employees with higher classifications in another federal agency. The Classification Act requires that civil service positions be classified by reference to a general set of classification standards. Each position is required to be placed in the appropriate class on the basis of "the duties and responsibilities of the position and the qualifications required by [its] duties and responsibilities" (5 U.S.C. 5106(a)); and each class is required to be placed in the appropriate grade on the basis of "the level of difficulty, responsibility, and qualification requirements of the work of the class" (5 U.S.C. 5106 (b)).

The Classification Act further provides that the initial classification of particular positions into the appropriate class and grade is the responsibility of federal employing agencies. 5 U.S.C. 5107. The Civil Service Commission, on the other hand, is required under the Act "after consulting the agencies, [to] prepare standards for placing positions in their proper classes and grades." 5 U.S.C. 5105(a). The Commission is also required "from time to time [to] review such number of positions in each agency as will enable [it] to determine whether the [employing] agency is placing positions in classes and grades in

conformance with or consistently with published standards." 5 U.S.C. 5110(a). If upon such review the Commission finds that a position has not been properly classified by the employing agency, the Commission has authority under the Act to reclassify the position in accordance with the Commission's published standards. 5 U.S.C. 5110(b). If the Commission finds in addition that an agency or a part of an agency is not adhering to the Commission's published standards, it may "require that prior approval of the Commission be secured before an action placing a position in a class and grade becomes effective for payroll and other personnel purposes." 5 U.S.C. 5111(a).

In addition to the general reviewing authority given the Commission under the Classification Act, which is normally exercised by the Commission *sua sponte* as part of its continuing responsibility to monitor the overall operation of the civil service classification system, the Commission is required under the Act to review the appropriateness of particular classifications whenever an affected employee requests that the Commission do so. 5 U.S.C. 5112(b). In the event of such an appeal to the Commission—such as that filed by respondents in this case—the Commission has the authority to ascertain the duties, responsibilities and qualification requirements of the position or positions involved and, ultimately, may "change a position from one class or grade to another class or grade when the facts warrant." 5 U.S.C. 5112(a)(4).

In ordering the Commission to compare the positions held by respondents with the positions held by employees with higher classifications in another federal agency, the Court of Claims ignored several essential features of this classification system. It has in effect, moreover, required the Commission to employ a classification method that Congress rejected when it adopted the present Classification Act.

Prior to enactment of the Classification Act of 1923, salaries in the federal civil service were set by reference to "title of position" only. See Report of the Congressional Joint Committee on Reclassification of Salaries, H.R. Doc. No. 686, 66th Cong., 2d Sess., pp. 44, 49 (1920). There were no general standards for paying federal employees uniformly according to the duties, responsibilities and qualifications involved in their respective positions. See generally, *id.* at 18-21, 31-60. The only available guide—in a confused and disjointed system where "[t]he rates of compensation of some positions [were] fixed by general statute, in other cases by the annual appropriation acts, and in still other cases by individual executive or administrative action" (*id.* at 44) —were *ad hoc* comparisons of particular positions. See *id.* at 44, 49; S. Rep. No. 486, 67th Cong., 2d Sess., p. 15 (1922); 62 Cong. Rec. 421 (1921) (remarks of Congressman Mann).

The marked defects of this comparison system led Congress to enact the Classification Act of 1923 (42 Stat. 1488). See S. Rep. No. 486, *supra*, at 4, 6-9, 15, 19-20; H.R. Rep. No. 461, 67th Cong., 1st Sess.,

pp. 1-2 (1921). That Act represented an attempt to bring order into civil service salary schedules by establishing generally-applicable classification standards and setting uniform salary levels based upon those standards. See *ibid.*; 61 Cong. Rec. 7723, 7724 (1921); 62 Cong. Rec. 334 (1921) (remarks of Congressman Lehlbach); 61 Cong. Rec. 7726, 7826 (1921) (remarks of Congressman Black). The Classification Act of 1949 (63 Stat. 954) simplified the administrative procedures for classifying federal civil service positions [15] and vested increased responsibility in the Civil Service Commission for establishing detailed classification standards, but it retained and reinforced the basic mechanism for ensuring uniformity: the requirement that particular civil service positions be classified by reference to the Commission's generally-applicable standards, rather than on the basis of position-to-position comparisons. See 63 Stat. 958-959; S. Rep. No. 847, 81st Cong., 1st Sess., pp.

[15] The administration of the Classification Act of 1923 was initially vested in the former Personnel Classification Board, which was charged with responsibility for (1) promulgating regulations for "ascertaining and recording the duties of positions and the qualifications required of incumbents" (42 Stat. 1489) and (2) mandatory review of agency classification decisions (*ibid.*). The Civil Service Commission took over administration of the Classification Act in 1932, and it has issued public classification standards under the Act since July 1943. See S. Rep. No. 847, 81st Cong., 1st Sess., p. 5 (1949); Report of President's Committee on Civil Service Improvement, H.R. Doc. No. 118, 77th Cong., 1st Sess., p. 16 (1941). The Classification Act of 1949 made the Commission's review of agency classification decisions discretionary, rather than mandatory. Compare 63 Stat. 958-959 with 42 Stat. 1489.

26-28, 34-35 (1949); H.R. Rep. No. 1264, 81st Cong., 1st Sess., pp. 2-4, 8-10 (1949).

This method of classification was codified, without substantive change, in the Classification Act of 1966, 5 U.S.C. 5101, *et seq.* See H.R. Rep. No. 901, 89th Cong., 1st Sess., pp. 1, 3-4, 66-73 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess., pp. 18-21, 86-92 (1966). The "equal pay for substantially equal work" principle in the Act (5 U.S.C. 5101(1)(A)) was not intended to require classification by comparison of positions, but constitutes rather a declaration of policy intended to guide the Commission in formulating generally-applicable classification standards.

The order entered by the Court of Claims in this case severely distorts the classification system created by the Classification Act. Instead of requiring that respondents' positions be classified by reference to generally-applicable standards promulgated by the Commission, as contemplated by Congress in the Classification Act, the Court of Claims' decision requires the Commission to engage in an *ad hoc* comparison of those positions with the responsibilities of and the functions performed by employees in another federal agency. The order, in effect, turns the Classification Act on its head by requiring the Commission to use as its referent in reviewing the appropriateness of respondents' classifications the classification decisions reached by a federal employing agency rather than the general classification standards.

An even more fundamental objection to the court's order, however, is that it will pose perhaps insuper-

able practical problems in the future—practical problems of which Congress was aware and which figured significantly in its decision not to require the Commission to engage in *ad hoc* comparisons of positions as a means of classification (see discussion, *supra*, at pp. 25-26). In the vast majority of cases, the employing agency, which has the initial classification responsibility (5 U.S.C. 5107), will not have access to the kind of detailed information that would be needed were it required to compare a particular position to be classified with positions in other federal agencies. And although the Commission may have such information, Congress did not intend that the Commission would review all classification decisions made by employing agencies. 5 U.S.C. 5110, 5112; 5 C.F.R. 511.603, *et seq.* Thus, the effective decision in most classification cases is made by a decision-making body (the employing agency) that is not equipped to make inter-agency comparisons of positions.

Quite apart from the fact that the Court of Claims failed to take into account the practical limitations upon the number of classification decisions that the Commission can feasibly review, it would distort the traditional functions and purposes of administrative review to require the Commission to make position-to-position comparisons in reviewing classification decisions made by federal employing agencies. Since those agencies do not have the resources to make such comparisons, review by the Commission would involve considerations not taken into account by the

initial decision maker. We submit that in the long run an *ad hoc*, jerry-built classification system of this sort would not be conducive to equitable classification since only those classification decisions reviewed by the Commission would be measured against the full range of considerations made appropriate by the Court of Claims' order.

To require inter-agency comparisons would also impose substantial additional administrative burdens upon the Commission. See H.R. Rep. No. 507, 66th Cong., 2d Sess., p. 2 (1919), noting burdens imposed upon the Joint Reclassification Commission by investigations of particular positions. Since there is no basis for assuming that the position or positions asserted to provide a referent for classification purposes are themselves properly classified, the Commission would have to undertake a detailed investigation of those positions prior to reviewing the classification being appealed. It is perhaps conceivable that Congress at some point will decide that the advantages of blanket inter-agency comparisons are worth the additional resources that would be required to perform them, and that it will provide the Commission with those additional resources; for the present, however, Congress has decided to the contrary.

In remanding this case to the Commission for further proceedings, the Court of Claims attempted to some extent to deal with these practical problems by noting that its holding was limited to the facts of the present case. Specifically, the court noted that

while it is "[o]rdinarily" not arbitrary and capricious for the Commission to refuse to make position-to-position comparisons, such comparisons were required here since the "employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees [were] specifically pointed out by the complaining employees" (Pet. App. A, p. 2a). We submit that the court's holding is not as susceptible to principled limitation as the court appeared to imply, and that the practical difficulties discussed above cannot be so readily dismissed.

The Court of Claims' decision in this case encourages federal employees to seek to identify other federal employees with higher classifications whose duties are to some extent similar to their own. The court has left to the Commission, and to federal employing agencies in the first instance, the difficult task of determining how substantial the "nexus of duties shared in common" must be before the Commission is required to investigate the positions cited by the complaining employees and to engage in position-to-position comparisons. Since the similarity between various positions will always be a matter of degree, variable over time and depending fundamentally upon the exercise of judgment, the potential for friction in the classification process and for disputes unresolvable save through litigation is a very real difficulty inherent in the court's decision.

Finally, the Civil Service Commission's long-standing administrative interpretation confirms that the

Classification Act does not contemplate inter-agency comparisons of particular positions, whether on an *ad hoc* basis or as a matter of general review policy.[16] The comparison method is not provided for in the applicable classification standards published by the Commission. See General Attorney Series, GS-905-0 (App. 14-42). Those standards, as well as the Commission's other publications dealing with appropriate methods of classification of civil service positions, emphasize the need for classification by reference to generally-applicable standards promulgated by the Commission.[17] This consistent administrative inter-

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[16] Indeed, in light of the fact that Congress replaced the *ad hoc* "title of position" method of classification (see discussion, *supra*, at 25-26) with the general standards method of classification in the Classification Act, there is substantial doubt concerning the Commission's statutory authority to classify respondents' positions by reference to positions in another federal agency. Consequently, it can be argued with some force that the dispute here centers not on whether the Classification Act *requires ad hoc* position-to-position comparisons but whether it *permits* such comparisons.

[17] In January 1972 the Civil Service Commission completed a two-year study of job evaluation and pay systems in public jurisdictions and private industry. *Report of the Job Evaluation and Pay Review Task Force to the United States Civil Service Commission* (January 1972). As a result of that study, the Commission is now testing for possible implementation within the federal civil service a "factor ranking/benchmark" approach to job evaluation. Such an approach would combine three related classification techniques: (1) whole job or occupational ranking, (2) factor comparison and (3) point rating. While benchmark job descriptions would be used as one component of the "factor ranking/benchmark" approach, the job description would be specifically approved by the Commission and would be incorporated into the Com-

pretation by the Commission of its responsibilities under the Classification Act is entitled to weight in determining the meaning of that Act. See, *e.g.*, *Perkins* v. *Matthews*, 400 U.S. 379, 391; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Udall* v. *Tallman*, 380 U.S. 1, 16; *White* v. *United States Civil Service Commission*, 468 F. 2d 1357, 1358-1359 (C.A. 9); *Schellfeffer* v. *United States*, 343 F. 2d 936, 942, 170 Ct. Cl. 178, 187.

In summary, while a federal employee is entitled to have his classification reviewed by the Commission under generally-applicable standards, the Classification Act does not require that the Commission make *ad hoc* comparisons between the position being classified and positions in other agencies. The Commission found here, after careful review of all relevant information, that respondents were properly classified as GS-13s (App. 44-45, 101-102). There is no warrant in the Classification Act for requiring a comparison between respondents' positions and the A.F.L.C. positions, and the Court of Claims erred in ordering the Commission to do so.

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mission's generally-applicable standards. See *Report of Project To Develop, Test, and Evaluate an Improved Approach to the Evaluation of Non-Supervisory Positions at GS-1 thru GS-15* (July 1974); *Instructions for Field Test of the Factor-Ranking/Benchmark Approach to the Evaluation of General Schedule Positions GS-1 thru GS-15* (October 1973); *Benchmark Position Descriptions for the Factor Ranking/Benchmark Approach to the Evaluation of General Schedule Positions GS-1 thru GS-15* (July 1973).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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MAY 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 574273 156